No. 83-1968

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

LACY H. THORNBURG, *et al.*,

Appellants,

v.

RALPH GINGLES, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA

SUPPLEMENTAL BRIEF FOR APPELLEES

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TABLE OF AUTHORITIES

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SUPPLEMENTAL BRIEF FOR APPELLEES

Appellees submit this Supplemental Brief in response to the brief filed by the United States.

The controlling question raised by the brief of the United States concerns the standard to be applied by this Court in reviewing appeals which present essentially factual issues. A section 2 action such as this requires the trial court to determine whether

> the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by [a protected group].

The presence or absence of such equal opportunity, like the presence or absence of a discriminatory motive, is a factual question. See Hunter v. Underwood, ___ U.S. ___ (1985); Rogers v. Lodge, 458 U.S. 613 (1982). Correctly recognizing the factual nature of that issue, this Court has on two occasions during the

[1] 42 U.S.C. § 1973(b).

present term summarily affirmed appeals in section 2 actions. Strake v. Seamon, No. 83-1823 (Oct. 1, 1984); Brooks v. Allain, No. 83-1865 (Nov. 13, 1984). If an ordinary appeal presenting a disputed question of fact is now to be treated for that reason alone as presenting a "substantial question," then this case, and almost all direct appeals to this Court, will have to be set for full briefing and argument. We urge, however, that to routinely treat appeals regarding such factual disputes as presenting substantial questions would be inconsistent with Rule 52(a), Federal Rules of Civil Procedure, and with the efficient management of this Court's docket.

The Solicitor General, having conducted his own review of some portions of the record,[2] advises the Court that, had he

[2] The Solicitor General, understandably less

been the trial judge, he would have decided portions of the case differently. The judges who actually tried this case, all of them North Carolinians with long personal understanding of circumstances in that state, concluded that blacks were denied an equal opportunity to participate in the political processes in six North Carolina multi-member and one single member legislative districts. The Solicitor General, on the other hand, is of the opinion that there is a lack of

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familiar with the details of this case than the trial court, makes a number of inaccurate assertions about the record. The government asserts, for example, "there is not the slightest suggestion" that black candidates were elected because whites considered them "safe". (U.S. Br. 18 n. 17). In fact there was uncontradicted testimony that only blacks who were safe could be elected. (Tr. 625-26, 691, 851, 857). The Solicitor also asserts, incorrectly, (U.S. Br. 17 n.14) that the 1982 election was the only election under the plan in question. In fact, the districts have been the same since 1971. (J.S. App. 19a)

equal opportunity in 2 districts,[3] that "there may well be" a lack of opportunity in 2 other districts,[4] but that blacks in fact enjoy equal opportunity to participate in the political process in the three remaining districts.[5] Other Solicitors General might come to still different conclusions with regard to the political and racial realities in various portions of North Carolina.

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[3] House District 8 and Senate District 2; U.S. Brief 21.

[4] House District 36 and Senate District 22; U.S. Brief 20 n.10 The appendix to the jurisdictional statement which contains the District Court's opinion has a typographical error stating erroneously that two black citizens have run "successfully" for the Senate from Mecklenburg County. The correct word is "unsuccessfully". J.S. App. 34a.

[5] House Districts 21, 23 and 39; U.S. Brief 16.

The government's fact-bound and statistic-laden brief, noticeably devoid of any reference to Rule 52, sets out all of the evidence in this case which supported the position of the defendants. It omits, however, any reference to the substantial evidence which was relied on by the trial court in finding discrimination in the political processes in each of the seven districts in controversy.[6] The Senate Report accompanying section 2 listed seven primary factual factors that should be considered in a section 2 case and the government does not challenge the findings in the district court's opinion that at least six of those factors supported appellees' claims. On the contrary, the government candidly acknowledges "[t]he district court here faith-

[6] J.A. App. 21a-52a.

fully considered these objective factors, and there is no claim that its findings with respect to any of them were clearly erroneous." (U.S. Br. 11).

The government apparently contends that all the evidence of discrimination and inequality in the political process was outweighed, at least as to House Districts 21, 23 and 39, solely by the fact that blacks actually won some elections in those multi-member districts. It urges

> Judged simply on the basis of 'results,' the multimember plans in these districts have apparently enhanced -- not diluted -- minority strength. (U.S. Br. 16).

On the government's view, the only "result" which a court may consider is the number of blacks who won even the most recent election. Section 2, however, does not authorize a court to "judg[e] simply

on the basis of [election] 'results'", but requires a more penetrating inquiry into all evidence tending to demonstrate the presence or absence of inequality of opportunity in the political process.[7] Congress itself expressly emphasized in section 2 that the rate at which minorities had been elected was only "one circumstance which may be considered."

[7] The district court found, inter alia, that the use of racial appeals in elections has been widespread and persists to the present, J.S. App. 32a; the use of a majority vote requirement "exists as a continuing practical impediment to the opportunity of black voting minorities" to elect candidates of their choice, J.S. App. 30a; a substantial gap between black and white voter registration caused by past intentional discrimination; extreme racial polarization in voting patterns; and a black electorate more impoverished and less well educated than the white electorate and, therefore, less able to participate effectively in the more expensive multi-member district elections. There was also substantial, uncontradicted evidence that racial appeals were used in the 1982 Durham County congressional race and the then nascent 1984 election for U.S. Senate.

(Emphasis added). The legislative history of section 2 repeatedly makes clear that Congress intended that the courts were not to attach conclusive significance to the fact that some minorities had won elections under a challenged plan.[8]

The circumstances of this case illustrate the wisdom of Congress' decision to require courts to consider a wide range of circumstances in assessing whether blacks are afforded equal opportunity to participate in the political process. A number

[8] S. Rep. 97-417, 29 n.115 ("the election of a few minority candidates does not 'necessarily foreclose the possibility of dilution of the black vote', in violation of this section"), n. 118. ("The failure of plaintiff to establish any particular factor is not rebuttal evidence of non-dilution"). See also S. Rep. at 2, 16, 21, 22, 27, 29, 33 and 34-35. The floor debates are replete with similar references. In addition, see White v. Regester, 412 U.S. 755 (1973) affirming Graves v. Barnes, 343 F. Supp. 704, 726, 732 (W.D. Texas 1972) (dilution present although record shows repeated election of minority candidates).

of the instances in which blacks had won elections occurred only after the commencement of this litigation, a circumstance which the trial court believed tainted their significance.[9] In several other elections the successful black candidates were unopposed.[10] In one example relied on by the Solicitor in which a black was elected in 1982, every one of the 11 black candidates for at-large elections in that county in the previous four years had been defeated.[11] In assessing the political opportunities afforded to black

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[9] J.A. App. 37a. See also, S. Rep.at 29 n.115, citing Zimmer v. McKeithen, 485 F.2d 1297, 1307 (5th Cir. 1973),(post-litigation success is insignificant because it "might be attributable to politicalsupport motivated by different considerations -- namely that election of a black candidate will thwart successful challenges to electoral schemes on dilution grounds.")

[10] J.S. App. 42a, 44a.

[11] J.S. App. 35a, 42a-43a.

voters under those at-large systems, the Solicitor General evidently disagrees with the comparative weight which the trial court gave to these election results and to the countervailing evidence; the assessment of that evidence, however, was a matter for the trial court.

The Solicitor General seeks, in the alternative, to portray his disagreement with the trial court's factual findings as involving some dispute of law. This he does by the simple expedient of accusing the district court of either dissembling or not knowing what it was doing. (U.S. Brief 12) Thus, despite the district court's repeated statements that section 2 requires only an equal opportunity to participate in the political process,[12] the Solicitor General insists that "the only

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[12] J.S. App. 12a, 15a, 29a n.23, 52a.

explanation for the district court's conclusion is that it erroneously equated the legal standard of Section 2 with one of guaranteed electoral success in proportion to the black percentage of the population." (U.S. Brief 12, emphasis original). Elsewhere, the Solicitor, although unable to cite any such holding by the trial court, asserts that the court must have been applying an unstated "proportional representation plus" standard. (U.S. Brief 18 n.18). The actual text of the district court opinion simply does not contain any of the legal holdings to which the Solicitor indicates he would object if they were some day contained in some other decision.

The government does not assert that the trial court's factual finding of racially polarized voting was erroneous, or discuss the extensive evidence on which

that finding was based. Rather, the government asserts that the trial court, although apparently justified in finding racially polarized voting on the record in this case, adopted an erroneous "definition" of racial bloc voting. (U.S. Br. 13). Nothing in the trial court's detailed analysis of racial voting patterns, however, purports to set any mechanical standard regarding what degree and frequency of racial polarization is necessary to support a section 2 claim. Nothing in that opinion supports the government's assertion that the trial court would have found racial polarization whenever less that 50% of white voters voted for a black candidate. In this case, over the course of some 53 elections, an average of over 81% of white voters refused to support any black candidate. (J.S. App. 40a). Prior to this

litigation there were almost no elections in which a black candidate got votes from as many as one-third of the white voters. (J.S. App. 41a-46a). In the five elections where a black candidate was unopposed, a majority of whites were so determined not to support a black that they voted for no one rather than vote for the black candidate. (J.S. App.44a). While the level of white resistance to black candidates was in other instances less extreme, the trial court was certainly justified in concluding that there was racial polarization, and the Solicitor General does not assert otherwise.

The Solicitor General urges this Court to note probable jurisdiction so that, laying aside the policy of appellate self-restraint announced in Pullman-Standard v. Swint, 456 U.S. 273 (1981), and its progeny, the Court can embark upon

its own inquiry into the diverse nuances of racial politics in Cabarrus, Forsyth, Wake, Wilson, Edgecombe, Nash, Durham, and Mecklenburg counties. Twice within the last month, however, this Court has emphatically admonished the courts of appeals against such undertakings. Anderson v. City of Bessemer City, ___ U.S. ___ (1985); Witt v. Wainwright, ___ U.S. ___ (1985). Twice in the present term this Court has summarily affirmed similar fact-bound appeals from district court decisions rejecting section 2 claims. Starke v. Seamon, No. 83-1823 (October 1, 1984); Brooks v. Allain, No. 83-1865 (Nov. 13, 1984). No different standard of review should be applied here merely because in this section 2 case the prevailing party happened to be the plaintiffs.

Appellees in this case did not seek, and the trial court did not require, any guarantee of proportional representation. Nor did proportional representation result from that court's order. Prior to this litigation only 4 of the 170 members of the North Carolina legislature were black; today there are still only 16 black members, less than 10%, a far smaller proportion than the 22.4% of the population who are black. Whites, who are 75.8% of the state population, still hold more than 90% of the seats in the legislature.

In the past this Court has frequently deferred to the views of the Attorney General with regard to the interpretation of section 5 of the Voting Rights Act. No such deference is warranted with respect to section 2. Although the Department of Justice in 1965 drafted and strongly supported enactment of section 5, the

Department in 1981 and 1982 led the opposition to the amendment of section 2, acquiescing in the adoption of that provision only after congressional approval was unavoidable. The Attorney General, although directly responsible for the administration of section 5, has no similar role in the enforcement of section 2. Where, as where, a voting rights claim turns primarily on a factual dispute, the decisions of this Court require that deference be paid to the judge or judges who heard the case, not to a Justice Department official, however well intentioned, who may have read some portion of the record. White v. Regester, 412 U.S. 755, 769 (1973). The views of the Department are entitled to even less weight when, as in this case, the Solicitor's present claim that at-large districts "enhance" the interests of minority

voters in North Carolina represents a complete reversal of the 1981 position of the Civil Rights Division that such districts in North Carolina "necessarily submerge[] cognizable minority population concentrations into larger white electorates." (Section 5 objection letter, Nov. 30, 1981, J.S. App. 6a).

CONCLUSION

For the above reason, the judgment of the district court should be summarily affirmed.

Respectfully submitted,

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